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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO

MALIBU MEDIA, LLC, Plaintiff, vs. KEVIN PETERSON, Defendant. KEVIN PETERSON Counterclaimaint v. MALIBU MEDIA, LLC Counterdefendant	Case Number: 3:16-CV-00786-JLS-NLS **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES**

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

I. INTRODUCTION

Plaintiff respectfully requests the Court strike Defendant's affirmative defenses because they are either so broadly pled as to fail to give Plaintiff proper notice of the defense, fail as a matter of law, or lack any evidentiary support or foundation. However, Defendant's affirmative defenses will likely subject Plaintiff to broad discovery designed to impede Plaintiff's ability to litigate the case in an efficient manner. For these reasons, as set forth more fully below, Plaintiff respectfully requests the Court strike Defendant's affirmative defenses.

II. ARGUMENT

A. First Affirmative Defense: Unclean Hands

In Defendant's opposition to Plaintiff's Motion to Strike, Defendant incorrectly argues that when pleading unclean hands, "some courts" allow a defendant to plead harm to the public interest, instead of a direct harm to the defendant. This argument ignores Ninth Circuit precedent. Significantly, Plaintiff cited *Dream Games of Arizona Inc. v. PC Onsite*, 561 F.3d 983, 990–91 (9th Cir. 2009) for the notion that "the defense of illegality or unclean hands is 'recognized only rarely, when the plaintiff's transgressions is of serious proportions and relates directly to the subject matter of the infringement action." *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 990-91 (9th Cir. 2009). "[W]e hold that an award of either type of damages available under the Copyright Act--actual or statutory--is not precluded by evidence of illegal operation of the copyrighted work, at least where the illegality did not injure the infringer." *Id.* Defendant does not cite to one case since *Dream Games* that suggests in the Ninth Circuit a defendant's unclean hands defense can survive without pleading some sort of injury. Defendant's unclean hands defense fails as a matter of law because Defendant did not and cannot plead any injury from the false, unsupported and offensive allegations he raises in his affirmative defenses against Plaintiff.

B. Second Affirmative Defense: Implied License

Defendant, without any support, claims that Plaintiff has "seeded" works on BitTorrent because "a large number" of Plaintiff's works appear on BitTorrent "before they are 'officially' released by Malibu Media through its website." *See* CM/ECF 23 at *6. Like all of Defendant's accusations, this argument is unsupported, and nonsensical. If any of Plaintiff's movies appeared on BitTorrent prior to a release, it is likely because of the constant threat Plaintiff faces by unknown third parties seeking to unlawfully gain access to its popular works through various illegal means. Plaintiff's content is seeded by a myriad of IP addresses around the globe and done so in multiple formats, languages, and by many well-known seeding groups - just like any other popular content.

Indeed, major record labels and motion picture studios have their works "seeded" on BitTorrent prior to release as well – it is an unfortunate occurrence that popular content holders face because of a large piracy problem.[1] Just like major content holders, the adult industry also unequivocally experiences the same issues.[2] Plaintiff, like all other popular content holders, spends an enormous amount of effort to remove its content from BitTorrent websites and to increase security on its website to prevent hacking. The amount of resources it expends to keep its content off BitTorrent costs far more than any recovery it could possibly make from lawsuits. Moreover, as has always been the case, the revenue it makes from legal subscribers far exceeds any recovery from its anti-piracy litigation. Defendant's accusations are unfounded and nonsensical.

Not only does Defendant lack support for his affirmative defense of implied license, it fails as a matter of law. As Plaintiff stated in its Motion, "[i]n the Ninth Circuit, 'an implied license is granted when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work." *Asset Mktg. Sys.*,

[1] See e.g. https://torrentfreak.com/fbi-busts-movie-industry-insider-for-dvd-screener-leaks-160228/

[2] https://www freespeechcoalition.com/fbi-announces-major-hack-of-25-adult-sites/

Inc. v. Gagnon, 542 F.3d 748, 754–55 (9th Cir. 2008). Defendant admits he cannot plead these elements. Defendant did not request creation of Plaintiff's works. Plaintiff did not deliver the works to Defendant. And, Plaintiff certainly did not intend for Defendant to distribute its works.

Defendant cannot and did not cite to one Ninth Circuit case stating the standard was otherwise. Instead, Defendant relies on *MGM Studios, Inc. v. Grokster, Ltd*., 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) for the notion that an implied license may occur "impliedly through conduct." But, *MGM Studios, Inc*. holds in favor of Plaintiff and inapposite to Defendant's hypothetical argument. Specifically, *MGM Studios* rejected the kind of implied license Defendant seeks to assert, stating "the Ninth Circuit stated that '[c]ourts have found implied licenses only in 'narrow' circumstances where one party 'created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it.' Obviously, Plaintiffs did not create their copyrighted works at [Defendant's] request or for [Defendant's] benefit. [Defendant] therefore does not have an implied license to infringe, or to induce the infringement of, Plaintiffs' exclusive rights." *MGM Studios, Inc. v. Grokster, Ltd*., 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) citing *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1026 (9th Cir. 2001).

C. Third and Eighth Affirmative Defenses: Laches and Statute of Limitations

Defendant's affirmative defense of laches fails because the Ninth Circuit has expressly held that the defense of laches "is unavailable in an action under the Copyright Act." *Bizar v. Dee*, 618 F. App'x 913, 916 (9th Cir. 2015) citing *Petrella v. Metro-Goldwyn-Mayer*, Inc., 134 S. Ct. 1962, 1972-73, 188 L. Ed. 2d 979 (2014).

Defendant's affirmative defense of statute of limitations fails because Plaintiff pled separate infringement of each of its works occurred within the three-year limitation period. "It is widely recognized that the separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella v. Metro-Goldwyn-Mayer, Inc*., 134 S. Ct. 1962, 1969, 188 L. Ed. 2d 979 (2014). "[W]hen a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder's suit ordinarily will be timely under §

507(b) with respect to more recent acts of infringement (i.e., acts within the three-year window), but untimely with respect to prior acts of the same or similar kind." *Id*. "§ 507(b) 'allows plaintiffs during [the 70 year term of a copyright] to gain retrospective relief running only three years back from the date the complaint was filed.' Put another way, it is 'a rolling limitations period, which restarts upon each 'separate accrual' of a claim....If a defendant reproduces or sells an infringing work on a continuing basis, a plaintiff can sue every 3 years until the copyright term expires—which may be up to 70 years after the author's death." *Penguin Grp. (USA) Inc. v. Am. Buddha*, No. CV-13-02075-TUC-JGZ, 2014 U.S. Dist. LEXIS 188015, at *8 (D. Ariz. July 28, 2014).

Here, each time Defendant connects with an individual via the BitTorrent network he commits a separate and unique act of infringement through reproduction and distribution. "Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete "claim" that "accrue[s]" at the time the wrong occurs. In short, each infringing act starts a new limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969, 188 L. Ed. 2d 979 (2014). As set forth in *Petrella*, because Plaintiff has alleged that Defendant reproduced and distributed its works within the three year statute of limitations period, Plaintiff's lawsuit is within the applicable limitations period. *See e.g. Wolf v. Travolta*, No. 2:14-CV-00938-CAS, 2014 WL 2472254, at *2 (C.D. Cal. June 2, 2014) ("[P]laintiff alleges that defendants published the IF Program 'in the course of advertising and promoting [Travolta's] vocational film making programs.' Each of these publications could potentially constitute a separate act of infringement, each with a separate three year statute of limitations"); *Penguin Grp. (USA) Inc. v. Am. Buddha*, No. CV-13-02075-TUC-JGZ, 2014 U.S. Dist. LEXIS 188015, at *10 (D. Ariz. July 28, 2014) ("Because Penguin has alleged a continuing copyright violation by American Buddha, Penguin has alleged a timely claim with respect to all infringements that occurred within 3 years of the March 22, 2013 filing date of Penguin's Complaint. Accordingly, the Court rejects American Buddha's argument that the copyright claim alleged in Penguin's proposed Second Amended Complaint is untimely and therefore amendment would be futile");

Porter v. Combs, No. 15-CV-0523, 2015 WL 2375255, at *4 (N.D. Ill. May 15, 2015) ("Porter alleges that Defendants have committed acts of infringement in 2014 and 2015, and continue to do so. These acts fall within the limitations period and allow Porter to maintain his lawsuit").

"This provision creates a three-year 'look-back' limitations period that permits plaintiffs to reach all acts of infringement that occurred within the previous three years." *Wolf v. Travolta*, No. 2:14-CV-00938-CAS, 2014 WL 2472254, at *2 (C.D. Cal. June 2, 2014). "If infringement occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously." *Wu v. John Wiley & Sons, Inc.*, No. 14 CIV. 6746 AKH AJP, 2015 WL 5254885, at *4 (S.D.N.Y. Sept. 10, 2015) citing 1 Nimmer on Copyright § 12.05[B][1][b].

Defendant's additional argument that "to the extent that Plaintiff first observed a work being shared via BitTorrent more than three years from the date of filing of this suit, Plaintiff's claims would indeed be time-barred" lacks any sound theory in copyright law. *See* CM/ECF 8. Defendant seems to argue that if a copyright holder's work is ever infringed, by anyone, all infringers get a free pass after three years. While this theory is convenient for infringers, it is contrary to copyright law as set forth above. Not surprisingly, Defendant does not cite to any case law to support such a theory.

D. Fourth Affirmative Defense: Unconstitutionally Excessive Damages

Defendant, in his opposition, fails to support his argument that "unconstitutionally excessive damages" is properly pled as an affirmative defense. "The Court finds that the defense [of grossly excessive damages] is not properly asserted as an 'affirmative defense,' which is defined as '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Purzel Video GmbH v. St. Pierre*, 10 F. Supp. 3d 1158, 1170 (D. Colo. 2013) citing Black's Law Dictionary (9th ed. 2009). "While Defendant characterizes the defense as barring the Plaintiff's "claims" for statutory damages, Plaintiff's claim is actually for direct copyright infringement, the success of which may result in an "award" of damages. Proof of statutory damages is not an element of a copyright infringement claim." *Id*. "Thus, because the defense, as stated, 'cannot succeed' in defeating any portion of the Plaintiff's claim for direct infringement, the Court recommends that the District Court strike the twelfth defense." *Id.* "[B]ecause the Court defers Tenenbaum's challenge to the constitutionality of the Copyright Act's statutory damages scheme as premature, he may refile his due process challenge should a jury find liability and award damages against him." *Capitol Records, Inc. v. Noor Alaujan*, 626 F. Supp. 2d 152, 154 (D. Mass. 2009).

E. Fifth Affirmative Defense: Failure to Mitigate Damages

Defendant, in his opposition, argues that the Court should consider the "policy rationales supporting the general duty to mitigate damages" in attempting to apply the affirmative defense to a complaint that only seeks statutory damages. *See* CM/ECF 23 at *12. Defendant fails to consider the extent and degree of infringement that Plaintiff - and all copyright holders - face through Internet piracy. Plaintiff's policy is only to sue the worst of the worst infringers because, in doing so, it reduces to the greatest extent possible, the amount of seeding and distribution of its works on BitTorrent. On average, approximately 80,000 unique IP addresses infringe Plaintiff's works in the United States per month. Under Defendant's theory, Defendant would expect Plaintiff to sue everyone, as soon as they begin infringing, or not be entitled to the full remedies under the Copyright Act. This theory flies in the face of reason. First, it is impossible to bring an action against every individual that infringes Plaintiff's works. Second, Defendant should not be allowed to escape, or have reduced liability, on the basis that he infringed too much.

Courts have found that when a statutory damage serves as a penalty, the failure to mitigate damages defense does not apply. "[W]e emphasize that the penalty statute is just that, a penalty. Therefore, mitigation of damages would not apply." *Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994). Defendant himself admits that this is one of the purposes of statutory damages under the Copyright Act. *See* CM/ECF 23 at *9 ("the court correctly noted that a larger award "would be an excessive punishment…") "Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages 'whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant,' in order "'to sanction and vindicate the statutory policy' of discouraging infringement.'" *L.A. News Serv. v. Reuters TV Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998).

F. Sixth Affirmative Defense: Waiver

Defendant cannot plead an affirmative defense for waiver because waiver "occurs only if there is an intent by the copyright proprietor to surrender rights in his work." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). Here, Defendant asserts that Plaintiff is a staunch protector of its intellectual property, who has "filed upwards of 4000 lawsuits alleging infringement of its works." CM/ECF 12 at p. 5. Defendant fails to plead Plaintiff intended to surrender the rights to its works and cannot do so in good faith. For these reasons, Defendant's affirmative defense of waiver should fail.

G. Seventh Affirmative Defense: Estoppel

Defendant's seventh affirmative defense is the doctrine of estoppel, a defense that is "disfavored and … only applied as needed to avoid injustice." *Bangkok Broadcasting & T.V. Co., Ltd. v. IPTV Corp.*, 742 F. Supp.2d 1101, 1115 (C.D. Cal. 2010) (quoting *Richardson v. U.S.*, 60 U.S. 236, 267 (1856) ("Estoppels, which preclude the party from showing the truth, are not favored.")). Defendant's conclusory affirmative defense is so vague that it, "fails to give Plaintiff fair notice of "the nature and grounds for the affirmative defense." Kohler, 291 F.R.D. at 467-68.

Defendant's opposition does not dispute that Defendant's Answer emphasizes that Plaintiff is a known "prodigious litigant" who consistently files suit to prosecute the "infringement of its works via BitTorrent protocol." CM/ECF 12 at p. 5. Defendant does not explain, nor plead, how he could have been misled into thinking that Plaintiff would not enforce its rights against infringers on BitTorrent. "[T]he lack of factual pleading of the affirmative defense is a ground to strike the defense. Further, there is no evidence that [Plaintiff] did anything that would estop it from bringing a copyright infringement action." *Unichappell Music, Inc. v. ModRock Prods.*, LLC, No. CV 14-02382 DDP (PLAx), 2016 U.S. Dist. LEXIS 34184, at *28 (C.D. Cal. Mar. 16, 2016).

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order striking with prejudice Defendant's affirmative defenses and granting to Plaintiff any additional and further relief that the Court deems just and equitable under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: */s/ Henrik Mosesi*